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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

MERCHANTS BANK OF CALIFORNIA, N.A.,
Petitioner,
VS.
JOHN MARDULA, JR.,
Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the National Bank Act, 12 U.S.C. § 24 (Fifth), preempt a bank President's contractual cause of action seeking to enforce a severance pay provision in his written employment contract where the bank officer was discharged by the Bank's Board of Directors?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding below are Plaintiff JOHN MARDULA, Jr., the former President of the Bank, and RANCHO DOMINGUEZ BANK, N.A., the name of which has since been changed to MERCHANTS BANK OF CALIFORNIA, N.A. The bank has no subsidiaries. Daniel K. Roberts of the law firm of Roberts & Roberts is the principal owner of the bank.

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OPINIONS BELOW

The California Court of Appeal, Second District, Division Three, issued its opinion in this case on March 15, 1996. The citation for this case is *Mardula v. Rancho Dominguez Bank, N.A.*, 43 Cal.App.4th 790, 51 Cal.Rptr.2d 63 (1996).

In pertinent part, the decision of the Court of Appeal provides as follows:

"The appeal presents a question not yet decided by a California or a federal court: whether section 24 of the National Bank Act, which provides that all officers of a national bank serve at the pleasure of its board of directors, precludes enforcement of a bank's written agreement that its president will receive severance pay if discharged without

cause. We hold that the severance pay agreement is enforceable." *Mardula v. Rancho Dominguez Bank*, 43 Cal.App.4th at 792, 51 Cal.Rptr.2d at 63.

On July 17, 1996, the California Supreme Court denied RANCHO DOMINGUEZ BANK, N.A.'s Petition for Review.

JURISDICTION

Whenever the highest court of a state, by any form of decision, affirms or denies the validity of a judgment of an inferior court over which it by law can exercise appellate authority, the jurisdiction of the United States Supreme Court to review that decision, if it involves a federal question, will, on a proper proceeding attach. *Minneapolis, St. Paul, Saux St. Marie Railway Company v. Rock*, 279 U.S. 410, 412, 49 S.Ct. 363, 73 L.Ed. 766 (1929), *Gotthilf v. Sills*, 375 U.S. 79,79-80, 84 S.Ct. 187, 11 L.Ed.2d 159 (1963) and *Prudential Ins. Co. v. Cheek*, 259 U.S. 530,533-4, 42 S.Ct. 516, 66 L.Ed. 1044 (1922). Therefore, the denial of review by the California Supreme Court exhausts the California remedies and the case may be properly reviewed by the United States Supreme Court. *Douglas v. State of California*, 372 U.S. 353,354 n.1, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (certiorari).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 24 provides, in pertinent part, that a National Banking Association "shall have the power. . . [¶] Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places."

STATEMENT OF THE CASE

On May 3, 1994, Plaintiff and Appellant JOHN MARDULA filed a civil action in the Superior Court for the County of Los Angeles alleging a cause of action for "Breach of Employment Contract". (C.T., p.1-6).

The Complaint alleged that "At all times herein mentioned, Defendant RANCHO DOMINGUEZ BANK was a national bank authorized and existing under the laws of the State of California and the Federal Government." (C.T., p.1, ¶ 2).

The Complaint alleged that JOHN MARDULA had been terminated by Resolution of the Board of Directors of the Bank. (C.T., p.3-4, ¶ 10). It further alleged that RANCHO DOMINGUEZ BANK, N.A. had "breached the employment contract in that the employment contract calls for a six month severance package." (C.T., p.4, ¶ 11).

On June 8, 1994, Defendant RANCHO DOMINGUEZ BANK, N.A. demurred to the Complaint. (C.T., p.19-34). The demurrer alleged: "The First Cause of Action fails to state facts sufficient to constitute a cause of action against Defendant[ ] RANCHO DOMINGUEZ BANK . . . because it is preempted by 12 U.S.C. § 24." (C.T., p.21, ¶ 1).

A hearing was held on the demurrer on July 7, 1994 in Department 40 of the Los Angeles Superior Court, Central District, before the Honorable David A. Workman, Judge Presiding. The minute order from that hearing stated: "The demurrer is sustained, without leave to amend, on the ground that 12 U.S.C. § 24 preempts the complaint's causes of action. *Wells Fargo Bank v. Superior Court,* 53 Cal.3d 1082,1087,1088 (1991); *Mackey v. Pioneer National Bank,* 867 F.2d 520,525 (9th Cir.1989). . . . On motion of the defendants, the complaint is dismissed. C.C.P. § 581(f)(1)." (C.T., p.90).

On July 14, 1994, Appellant JOHN MARDULA timely filed his Notice of Appeal. (C.T., p.92-4).

On March 15, 1996, Division Three of the Second Appellate District issued its opinion, certified for publication, in this case. In pertinent part, the decision of the California Court of Appeal provided as follows:

"The appeal presents a question not yet decided by a California or a federal court: whether section 24 of the National Bank Act, which provides that all officers of a national bank serve at the pleasure of its board of directors, precludes enforcement of a bank's written agreement that its president will receive severance pay if discharged without cause. We hold that the severance pay agreement is enforceable." *Mardula v. Rancho Dominguez Bank,* 43 Cal.App.4th at 792, 51 Cal.Rptr.2d at 63.

"Respondents contend the contractual provision for severance pay is unenforceable because irreconcilable with the federal statute. We agree with plaintiff, however, that there is no inconsistency between the statute and a contract provision for a reasonable amount of severance pay." *Mardula v. Rancho Dominguez Bank,* 43 Cal.App.4th at 792, 51 Cal.Rptr.2d at 64.

REASONS FOR ALLOWANCE OF THE WRIT

The decision in this case is the third in a string of published state court cases which have permitted bank officers to sue for breach of the severance pay provisions of their contracts after their termination by the Board of Directors. *First National Bank of Danville v. Reynolds,* 491 N.E.2d 218 (Ind.App.1986), *Ewert v. Drexel National Bank,* 271 Ill.App.3d 1124, 208 Ill.Dec. 431, 649 N.E.2d 487 (Ill.App.1995) and *Mardula v. Rancho Dominguez Bank,* N.A., 43 Cal.App.4th 790, 51 Cal.Rptr.2d 63 (1996). These cases contradict a long string of federal and other

state cases which preclude bank officers, discharged by the board of directors, with or without cause, for suing for breach of contract.

These decisions are a new trend in the law which permit a national banking association to be sued by one of its officers for breach of contract where the discharge was ordered by the Board of Directors of the Bank.

Review by this court is necessary to secure uniformity of decision among state and federal courts and to vindicate a National Banking association's right to be free from contractual claims for relief brought by its discharged officers.

THE HOLDING OF THE COURT OF APPEAL DEVIATES FROM A LONG LINE OF CALIFORNIA CASES

In *Wells Fargo Bank v. Superior Court*, 53 Cal.3d 1082,1087, 282 Cal.Rptr. 841 (1991), Plaintiffs Wertz, Bothelo and Moore, bank officers, sued Wells Fargo on a number of theories. The Bank moved for summary judgment and summary adjudication. The trial court partially granted, and partially denied, these motions. "As a result of these rulings, Wertz, Bothelo and Moore were left with claims for breach of contract and breach of the implied covenant." (*Wells Fargo* at 53 Cal.3d at 1087). Wells Fargo appealed.

This California Supreme Court stated in its decision:

> "The National Bank Act grants specified corporate powers to each national bank, including the power 'To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.' (12 U.S.C. § 24, Fifth . . . .) It has been established for

> almost a century that section 24 preempts all state law causes of action by a bank officer for a breach of an employment agreement. (*Mackey v. Pioneer National Bank* (9th Cir.1989) 867 F.2d 520,524-526 . . . . ; *Westervelt v. Mohrenstecher* (8th Cir.1896) 76 Fed. 118.) We are aware of no decision to the contrary, and plaintiffs do not dispute the general rule of preemption."

Wells Fargo Bank v. Superior Court, 53 Cal.3d 1082,1087-8, 282 Cal.Rptr. 841 (1991).

Throughout the Opinion, the California Supreme Court ruled that causes of action by Bank officers were preempted.

> "The concurring opinion also argues the National Bank Act does not preempt state wrongful discharge law. To the contrary, as noted above, every case decided in this area has acknowledged the preemptive effect of section 24 on state law causes of action brought by dismissed bank officers. As the Court of Appeals for the Ninth Circuit explained in *Mackey*, supra, in holding that state law tort and contract claims were preempted by section 24: 'Moreover, it would make little sense to allow state tort claims to proceed . . . . The effect would be to substitute tort for contract claims, thus subjecting the national bank to all the dangers attendant to dismissing an officer . . . . The intent of the statute was to place the fullest responsibility upon the directors by giving them the right to discharge such officers at pleasure . . . . It is idle to say that the statute merely gives the power to discharge the official, without the right to do so. The grant of power carries with it the untrammeled right to its exercise, free from penalty.' (*Mackey*, supra, 867 F.2d at p.526)."

Wells Fargo Bank v. Superior Court, 53 Cal.3d 1082,1093, 282 Cal.Rptr. 841 (1991).

"A national bank is granted a broad and unique exemption from state wrongful discharge law by section 24." *Wells Fargo Bank v. Superior Court*, 53 Cal.3d 1082,1099, 282 Cal.Rptr. 841 (1991).

The central issue in the *Wells Fargo* case was whether bank officers, who were discharged by more senior bank officers, rather than the Board of Directors, had their wrongful discharge claims preempted by 12 U.S.C. § 24.

"We hold that section 24 does not preempt state law causes of action for wrongful discharge by a former national bank officer unless the officer was dismissed by the bank's board of directors itself . . . ." *Wells Fargo Bank v. Superior Court*, 53 Cal.3d 1082,1103, 282 Cal.Rptr. 841 (1991).

In that Respondent JOHN MARDULA admits that (1) he was the President of RANCHO DOMINGUEZ BANK, N.A., an office specifically enumerated in the statute, (2) that RANCHO DOMINGUEZ BANK, N.A., is a national banking institution, covered by the Act, and (3) that he was discharged by resolution of the Board of Directors, the factual and legal basis for the ruling of the trial court seems well established.

Three decisions of the California Courts of Appeal in various districts are in accord.

"A contract with the cashier of a national banking association . . . . will not support an action for damages for discharge nor permit recovery of salary accruing after such discharge." *Cox v. First National Bank*, 10 Cal.App.2d 302,305, 52 P.2d 524 (4th Dist.1935). Yet the severance payments permitted by the Court of Appeals' decision in this case permits the recovery of salary accruing after discharge. "[S]everance and dismissal payments are made with respect to a period of time immediately following such

severance of or dismissal from employment." *Powell v. California Dept. of Employment*, 63 Cal.2d 103,106, 45 Cal.Rptr. 136 (1965).

Thirty five years later, this position was reconfirmed. "By virtue of this statute the board may dismiss an officer without liability for breach of the agreement to employ. (*Cox v. First Nat. Bank* (1935) 10 Cal.App.2d 302,305 .... Because of this statute, plaintiff cannot state a cause of action for breach of his contract of employment. The demurrer to the first count was properly sustained." *Kozlowsky v. Westminster National Bank*, 6 Cal.App.3d 593,597, 86 Cal.Rptr. 52 (2nd Dist,1970).

Twenty years still later, this principle was again accepted.

> "[A]t the heart of this inviolable dismissal provision is a linkage with public policy protecting the financial stability and fiscal integrity of banks by making it beyond the powers of bank directors to enter into any contract restricting their ability to respond expeditiously to financial threats posed by bank officers .... In light of this historical purpose, it is not surprising that contractual claims of employment rights have been deemed preempted by section 24 (Fifth) and its twins in analogous federal statutes. This has been true whether the claims have been anchored in express contractual terms, in implied-in-fact covenants, or in covenants implied in law .... Unremarkably, therefore, throughout the years '[t]he case law uniformly [has] interpret[ed] this section and substantially similar provisions which do not allow a national banking association to discharge its officers at will without incurring liability for breach of contract.' (Citation omitted).
>
> "California has long been in accord with this doctrine with respect to express contractual rights of employment. Thus, in *Kozlowsky v. Westminster Nat.*

> *Bank*, supra, 6 Cal.App.3d 593, the president of a national bank sued for breach of his contract of employment. The *Kozlowsky* court held that section 24 (Fifth) overrode any contract to employ such an officer for a fixed term. 'By virtue of this statute the board may dismiss an officer without liability for breach of the agreement to employ.' (*Id.* at pp.596-597.) The same result was reached in *Cox v. First Natl. Bank* (1935) 10 Cal.App.2d 302 [52 P.2d 524]. There the cashier of a national bank brought suit against the bank to recover unpaid salary during vacation periods. On the salary issue, the *Cox* court noted that '[a] contract with the cashier of a national banking association appointing the cashier for a definite period at a fixed salary is void and does not prevent his removal at any time by the board of directors. It will not support an action for damages for discharge nor permit recovery of salary accruing after such discharge.' (*Id.* at p.305)."

Aalgaard v. Merchants National Bank, Inc., 224 Cal.App.3d 674,689-690, 274 Cal.Rptr. 81 (3rd Dist.1990), rev.den., cert.den. 502 U.S. 901, 112 S.Ct. 278, 116 L.Ed.2d 230.

> "This long line of cases supports the proposition that employment rights of officers of national banking associations which conflict with the right of the board of directors to dismiss them at pleasure are preempted by section 24 (Fifth) whether those rights arise by virtue of an agreement or are imposed by state law, and whether framed as contractual or tortious causes of action. As these cases illustrate, the essential Congressional purpose reflected in the 'at pleasure' provision of section 24 (Fifth) was to confer upon the Board of Directors sweeping powers of dismissal in order to insure the fiscal integrity of national banks and to instill public confidence in those financial institutions. State-based employment rights which inhibit or reduce the

> power of the board to dismiss its officers 'at pleasure' thus conflict with section 24 (Fifth) and stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Since these state-based claims would frustrate the full effectiveness of federal law by diminishing the full power of the board to dismiss its officers for the benefit of national banks, they must fall under the supremacy clause."

Aalgaard v. Merchants National Bank, Inc., 224 Cal.App.3d 674,692, 274 Cal.Rptr. 81 (3rd Dist.1990), rev.den., cert.den. 502 U.S. 901, 112 S.Ct. 278, 116 L.Ed.2d 230.

The Court of Appeals opinion asserts that its decision addresses an issue "not yet decided by a California or federal court" (43 Cal.App.4th at 792, 51 Cal.Rptr.2d at 63). But this is only true if the decisions preempting contractual causes of action are thought not to apply to a "severance pay" clause in such a contract. Even though all potential clauses of an employment contract have not been addressed in published opinions, RANCHO DOMINGUEZ BANK N.A. asserts that the decisions preempting contractual causes of action include any conceivable clauses in such a contract. This is not a new issue; it is a well resolved issue.

THE CODE OF FEDERAL REGULATIONS DOES NOT REPEAL 12 U.S.C. § 24 BY IMPLICATION

The Court of Appeals', decision relies upon a 1971 C.F.R. regulation which it contends authorizes this suit.

"An interpretive ruling by the U.S. Comptroller of the Currency, codified in the Code of Federal Regulations, provides that the board of directors of a national bank 'may enter into employment contracts with its officers and employees upon reasonable terms and conditions.' (12 C.F.R.

§ 7.5220)." *Mardula v. Rancho Dominguez Bank*, 43 Cal.App.4th at 795, 51 Cal.Rptr.2d at 66.

12 CFR § 7.5220 actually provides that "The board of directors of a national bank, pursuant to paragraph Fifth of 12 U.S.C. 24, may enter into employment contracts with its officers and employees upon reasonable terms and conditions." Note that the actual regulation specifically mentions the statute creating the preemption.

Respondent argued below that this administrative regulation "interpreted" the statute so as to allow a state law contractual claim to enforce a "golden parachute" or "severance pay" provision in the contract.

However, "it is axiomatic that an administrative agency may not modify, alter or enlarge the provisions of a legislative act being administered." *Nadler v. California Veterans Board*, 152 Cal.App.3d 707, 199 Cal.Rptr. 546 (1984) citing *Ralphs Grocery v. Reimel*, 69 Cal.2d 172,176, fn.3, 70 Cal.Rptr. 407 (1968) and *California State Restaurant Association v. Whitlow*, 58 Cal.App.3d 340,347, 129 Cal.Rptr. 824 (1976). "Correspondingly, there is no agency discretion to promulgate a regulation which is inconsistent with the governing statute." *Ontario Community Foundation v. State Board of Equalization*, 35 Cal.3d 811, 201 Cal.Rptr. 165,168 (1984). "Administrative regulations that violate acts of the Legislature are void and no protestations that they are merely an exercise of administrative discretion can sanctify them." *Morris v. Williams*, 67 Cal.2d 733,737, 63 Cal.Rptr. 689 (1967).

The administrative interpretation is not binding on an appellate court. *Perdue v. Crocker National Bank*, 38 Cal.3d 913,935-6 (1985), *Carmona v. Division of Industrial Safety*, 13 Cal.3d 303,310, 118 Cal.Rptr. 473 (1975), *Skyline Homes, Inc. v. Occupational Safety & Health Appeals Bd.*, 120 Cal.App.3d 663,669, 174 Cal.Rptr. 665 (1981). This is

because a regulation cannot legitimately effect a change in a statute contrary to the legislature's intent. *Ontario Community Foundation, Inc. v. State Board of Equalization*, 35 Cal.3d 811,816-7, 201 Cal.Rptr. 165 (1984). "In any event, administrative construction of a statute, while entitled to weight, cannot prevail when a contrary legislative purpose is apparent." *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.*, 29 Cal.3d 101,117, 172 Cal.Rptr. 194 (1981).

THE CORRECT STATUTORY CONSTRUCTION OF 12 U.S.C. § 24(5) PREEMPTS STATE LAW CONTRACTUAL CAUSES OF ACTION

"The National Bank Act grants specified corporate powers to each national bank, including the power 'To . . . dismiss such officers or any of them at pleasure, and appoint others to fill their places.' (12 U.S.C. § 24, Fifth . . . .) It has been established for almost a century that section 24 preempts all state law causes of action by a bank officer for a breach of an employment agreement. (*Mackey v. Pioneer National Bank* (9th Cir.1989) 867 F.2d 520,524-526 . . . .; *Westervelt v. Mohrenstecher* (8th Cir.1896) 76 Fed. 118.) We are aware of no decision to the contrary, and plaintiffs do not dispute the general rule of preemption." *Wells Fargo Bank v. Superior Court*, 53 Cal.3d 1082,1087-8, 282 Cal.Rptr. 841 (1991).

We concur in the Court of Appeals observation that, '. . . . Unless and until Congress acts to adjust the wording of the statute to meet the changed conditions in the banking industry, we look to the words of Paragraph Fifth [of section 24] for federal policy. We apply the statute strictly, according to its terms.' " *Wells Fargo Bank v. Superior Court*, 53 Cal.3d 1082,1099, 282 Cal.Rptr. 841 (1991).

"[T]his is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." *Greenwood v. United States*, 350 U.S. 366,374, 76 S.Ct. 410,414, 100 L.Ed. 412 (1956).

> "Where, as here, the wording of a statute is unambiguous, it should be enforced fully as written. (Citations omitted). Here, the words 'dismiss... at pleasure' should be taken to signify exactly that, as courts in many jurisdictions have said for over a century. (See Annot. 111 A.L.R. 894 (1937).) Moreover, the fact that Congress has amended other portions of Section 24, Title 12 numerous times, without altering paragraph 5 indicates to us that that body continues to support the judiciary's consistent construction of paragraph 5."

Kemper v. First Natl. Bank in Newton, 94 Ill.App.3d 169, 418 N.E.2d 819,821 (1981).

"As a general rule of statutory construction, if a statute announces a general rule and makes no exception thereto, the courts can make none. (*Stockton Theatres, Inc. v. Palermo*, 47 Cal.2d 469,476, 304 P.2d 7 (1956)). A court may not insert into a statute a qualifying provision not included nor rewrite a statute to conform to an inferred intention that does not appear from its language. (*Mills v. Superior Court*, 42 Cal.3d 951,957, 232 Cal.Rptr. 141, 728 P.2d 211 (1986))." *Johnston v. Dept. of Personnel Administration*, 191 Cal.App.3d 1218, 236 Cal.Rptr. 853,856 (1987).

Here, the statute speaks for itself and preempts all causes of action in Respondent JOHN MARDULA's Complaint.

PRIOR PRECEDENTS FULLY SUPPORT THE "WELLS FARGO" DECISION IN DETERMINING THAT STATE LAW CAUSES OF ACTION ARE PREEMPTED BY 12 U.S.C. § 24(5)

The *Wells Fargo* decision was based on a long line of federal and sister state precedents consistently interpreting Paragraph Fifth.

"For instance, corporate bylaws or contractual provisions that purport to give a cashier a term of office are void (*Westervelt v. Mohrenstecher* (8th Cir.1896) 76 Fed. 118,122), and the contractual and tort claims of an executive vice president of a national bank based on a dismissal are completely barred. (*Mackey v. Pioneer National Bank* (9th Cir. 1989) 867 F.2d 520,522,525-6.)" *Wells Fargo Bank v. Superior Court*, 53 Cal.3d 1082,1105-6, 282 Cal.Rptr. 841 (1991), (Conc. Op., Kennard, J.).

The stage for interpreting the "at pleasure" provision was set in *Westervelt v. Mohrenstecher*, 76 Fed. 118 (8th Cir.1896). There, persons who had posted a bond to secure the performance of the bank's cashier refused to pay the bank's receiver on the ground that the bond expired when the prior cashier's one-year term ended. In spite of bylaws that set a one-year term, the court rejected the contention that the cashier's office had a one-year term. The Court explained:

> "The act of Congress expressly fixed the tenure of office of the cashier of this bank. It expressly provided that the board of directors might dismiss the cashier and certain other officers 'or any of them at pleasure and appoint others to fill their places.' It provided that this cashier should always hold his (or her) office subject to instantaneous removal at the pleasure of the board of directors. Nor is it at all probable that this

provision of the national bank act was inserted without purpose or consideration. Observation and experience alike teach that it is essential to the safety and prosperity of banking institutions that the active officers, to whose integrity and discretion the moneys and property of the bank and its customers are entrusted, should be subject to immediate removal whenever the suspicion of faithlessness or negligence attaches to them. High credit is indispensable to the success and prosperity of a bank. Without it, customers cannot be induced to deposit their moneys.... It sometimes happens that, without any justification, a suspicion of dishonesty or carelessness attaches to a cashier or a president of a bank, spreads through the community in which he (or she) lives, scares the depositors, and threatens immediate financial ruin to the institution. In such a case it is necessary to the prosperity and success — to the very existence — of a banking institution that the board of directors should have the power to remove such an officer, and to put in his (or her) place another, in whom the community has confidence. In our opinion, the provision of the act of Congress to which we have referred was inserted, ex industria, to provide for this very contingency."

Westervelt v. Mohrenstecher, 76 Fed. 118,122 (8th Cir.1896).

Other sister state courts are in accord, even on the issue of severance pay.

"In our view, the arrangement under which the appellant [Bank] was required to pay Bennett, at the termination of his employment, a year's salary for unrendered services is directly contrary to the untramelled right to dismiss officers 'at pleasure' conferred by paragraph fifth of the National Bank Act." *International Bank of Miami v. Bennett*, 513

So.2d 1294 (Fla.App. 3 Dist. 1987), cert.denied, 485 U.S. 988 (1988).

In this case, the issue is the same: Can the bank be required to pay MARDULA six months severance pay?

In *Rhode v. First Deposit National Bank*, 127 N.H. 107, 497 A.2d 1214 (1985), a discharged officer of a national bank sought damages under his employment contract which had provided that if he were terminated without cause any time prior to the expiration of his three year contract, he would receive as compensation the salary due him for those three years. The court affirmed the dismissal of his claim on the ground that such a contractual provision contravened the bank's right to immediately discharge the officer.

The court in *Copeland v. Melrose National Bank*, 229 A.D. 311, 241 N.Y.S. 429, aff'd, 254 N.Y. 632, 173 N.E. 898 (1930), similarly refused to enforce a provision in a bank officer's employment contract requiring the bank to pay the remainder of the officer's salary for the unexpired period of his employment contract in the event of termination prior to the expiration of his contract.

In *Van Slyke v. Andrews*, 178 N.W. 959,960 (1920), the Metropolitan National Bank President agreed to resign as Bank President on condition that he would be elected as Chairman of the Board and that he (or his heirs) would receive payments of $1,000 per month for fourteen months. "The complaint further sets forth that plaintiff resigned the office of president.... in reliance on the agreement...." Three months later the new board of directors repudiated the agreement and refused to pay him $11,500 due under its terms. The court sustained "respondent's contention that the contract set forth in the complaint is void as against public policy.... [T]he national banking law expressly provides that any officer of a national bank may be removed at any time by the board of directors, and any contract which

would restrict the right to exercise this statutory power is necessarily void." 178 N.W. at 960.

PUBLIC POLICY SUPPORTS PREEMPTION

This court may take judicial notice of the extraordinary wave of bank mergers in the past few years. Bank of America's purchase of Security Pacific National Bank and Wells Fargo's purchase of First Interstate being the most notable California instances of this trend. But mergers have taken place at all levels of the banking industry over the past few years. All experts seem agreed that the consolidation in the industry will continue as a result of profound changes in the banking business.

To permit the existing officers of banks to insert severance pay provisions, sometimes known as "golden parachutes", into their renewed employment contracts invites self-dealing and "poison pill" defenses to hostile take overs. Banking is a highly regulated industry because banks, in effect, borrow money from their depositors at very low rates of interest due to the fact that such loans are guaranteed by the full faith and credit of the United States through the Federal Deposit Insurance Corporation. Fraud by highly placed bank officials was a principal cause of the Savings and Loan disaster, which, by its addition to the national debt, will affect every taxpayer for years to come. The dismissal at pleasure rule, applicable only to the highest bank officers (those hired and fired by the Boards of Directors itself) is not only the established law but it is good public policy as well.

CONCLUSION

WHEREFORE, Petitioner RANCHO DOMINGUEZ BANK, N.A. respectfully requests that this court grant its petition for certiorari.

Dated: December 6, 1996,

Respectfully submitted,

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